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Daly, Yvonne Marie

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Judicial Oversight of Policing: Investigations, Evidence and the Exclusionary Rule

Yvonne Marie Daly*

Abstract
Police procedures and practices in the investigation of crime are shaped by many things. One particularly important constituent part of the development of investigative procedures and practices is the approach of the courts to the admissibility at trial of evidence obtained in a certain manner. While a judge can only address the specifics of whatever cases are brought before him, the judiciary as a whole have a significant role to play in terms of police accountability and governance through their development and application of any exclusionary rules of criminal evidence. This article examines the judicial oversight of policing by way of the exclusion of improperly obtained evidence at trial. Its central focus is on the development and operation of the exclusionary rule in Ireland, though relevant law in other jurisdictions, including England and Wales, the United States, Canada and New Zealand, is also considered. Particular attention is paid to the recent Irish Supreme Court decision of DPP v Cash, and its ramifications for judicial oversight of policing.

Introduction

For many years, the Irish courts have operated one of the strictest exclusionary rules in relation to improperly obtained evidence in the common law world. Where evidence is obtained in breach of the constitutional rights of a suspect it is subject to automatic exclusion at trial, unless there are in existence extraordinary excusing circumstances justifying its admission [22, 25, 14 and 31]. This strict rule has also been employed by the courts to exclude from trial derivative evidence which is causatively linked to an earlier breach of constitutional rights – what the Americans term the "fruit of the poisoned tree".

Unlike their American counterparts, however, the Irish judiciary have established and continue to operate this rule not on the principle of deterrence, but on the basis of protectionism. The main rationale for the strict exclusionary rule in relation to unconstitutionally obtained evidence in Ireland is the constitutional imperative to protect the rights of the individual and to endeavour to vindicate such rights in the event of violation [5, 11, 21 and 20]. Yet while the stated rationale may be protectionist, rather than preventative, the decisions of the courts in excluding evidence obtained in breach of constitutional rights inherently impact on the Garda

Síochána (the Irish police force) and lead to modifications in the behaviour of gardaí, particularly in terms of how they investigate crimes and gather evidence.

The strictness and rigidity of the Irish exclsuionary rule, however, has been criticised both on and off the judicial benches and calls for change have emanated from many quarters. In January 2010 the Irish Supreme Court gave its decision in the case of *DPP (Walsh) v Cash* [2007] IEHC 108 (28 March 2007), [2010] IESC 1 (18 January 2010), which involved the retention of a fingerprint, the legal status of which could not be fully established. This case was viewed by many as a chance for the Supreme Court to address the exclusionary rule and either to support its ongoing strict application or row back on its inflexible terms and allow greater discretion to trial judges, looking at the totality of the circumstances in a given case [11and 1].[1]

In the event the Supreme Court chose to do neither and side-stepped an in-depth discussion of the exclusionary rule. Nonetheless, its decision, discussed herein, is likely to have a significant impact on Garda investigations, as well as future court decisions relating to pre-trial matters.

This article examines the judicial oversight of policing by way of the exclusion of improperly obtained evidence at trial. While its focus is on Ireland, the laws of other jurisdictions, such as England and Wales, the United States, Canada and New Zealand are also considered. The article begins with a discussion of the exclusionary rule in Ireland. It also examines the application of the rule to derivative evidence, or the "fruit of the poisoned tree" doctrine. The *Cash* case is then examined and its implications for the future of police investigations and judicial oversight of same are considered. The article concludes with an eye to other jurisdictions and the future of the exclusionary rule in Ireland, particularly in terms of its role in police accountability and governance.

The Exclusionary Rule

[1] The *Final Report of the Balance in the Criminal Law Review Group* suggested that the Supreme Court might be able to reinterpret the law on unconstitutionally obtained evidence in an appropriate case, at pp.161-166.

Different jurisdictions have adopted differing rules in relation to the admission or exclusion of improperly obtained evidence. In England and Wales, for example, the common law allowed for the admission of all evidence, no matter how it was obtained. This was subject to a discretion to exclude evidence which was obtained oppressively, improperly or unfairly,[2] or as a result of the activities of an *agent provocateur* [17].[3] The discretion was rarely exercised, however, and, generally, if tendered evidence was relevant it was admitted despite the manner in which it was obtained.[4]

This traditional inclusionary approach was supplemented in 1984 by section 78 of the Police and Criminal Evidence Act which allows for the exclusion of improperly obtained evidence where in all the circumstances the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. However, this provision has been narrowly interpreted by the appellate courts, with the effect that the central basis for exclusion is unreliability due to the manner in which the impugned evidence was obtained. Thus exclusion usually occurs only in the context of confession evidence [2]. Generally, the introduction of section 78 has not led to a significant change in the approach of the courts of England and Wales to the admission of improperly obtained evidence, which is more often admitted than excluded.[5]

In the United States, as noted above, evidence improperly obtained will only be excluded from trial where there is some deterrent value in exclusion [16 and 13].[6] Recently, this approach appears to have been restricted even further with the suggestion in *Hudson v Michigan* 547 US 586, 126 S Ct 2159 (2006) [7] that, at least in relation to a breach of the knock-and-announce requirements recognised under the

[2] See *Kuruma v The Queen* [1955] AC 197; *King v R* [1969] 1 AC 304; and, *Jeffrey v Black* [1978] QB 298.
[3] See *R v Murphy* [1965] NI 138; *R v Foulder, Foulkes and Johns* [1973] Criminal Law Review 45; and, *R v Burnett and Lee* [1973] Criminal Law Review 748.
[4] *Kuruma v The Queen* [1955] AC 197, 203 *per* Goddard LJ: "the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how the evidence was obtained."
[5] See *A.G.'s Reference (No. 3 of 1999)* [2001] 2 Weekly Law Reports 56 and *Khan v United Kingdom* [1995] QB 27; [1997] AC 558; (2000) 31 EHRR 1016 and Choo and Nash [3].
[6] *US v Calandra* 414 US 338 (1974); *Wolf v Colorado* 338 US 25 (1949); *U.S. v Leon* 468 US 897 (1983).
[7] Discussed in Sklansky [30].

Fourth Amendment,[8] in the modern context of improved police accountability, training and discipline, a balancing test is also required. This balancing test contrasts the social cost of the exclusion of evidence—including the potential that a guilty person would go free—with the value of excluding the evidence, mainly in terms of the deterrent effect of such a ruling.

Providing a summary of the issues, as he viewed them, in *Hudson*, Scalia J. stated that

> …the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified. 547 US 586, 126 S Ct 2159 (2006) at 599 and 2168.[9]

Not only is a deterrent value necessary in order to have improperly obtained evidence excluded from trial in the United States then, that deterrent value must be so great as to outweigh the social costs of exclusion.

A balancing test has also been introduced as part of the law on exclusion in New Zealand. Traditionally, New Zealand operated an inclusionary rule in relation to tainted evidence, whereby all relevant evidence would be admitted no matter how it was obtained, although judges maintained a discretion to exclude on grounds of unfairness to the accused.[10] This discretion was supplemented in the 1990s by judicial interpretation of the remedies to be provided for breach of the New Zealand Bill of Rights Act, 1990. The courts developed a *prima facie* rule of exclusion to apply in such circumstances, once the accused established that the impugned evidence had been obtained in breach of the 1990 Act.[11] The *prima facie* rule could be displaced in a number of circumstances including evidence that the relevant breach was inconsequential, where there was no real and substantial connection between the breach and the obtaining of the evidence, or where the evidence would have been discovered in any event. Evidence obtained in breach of the 1990 Act should,

[8] See *Wilson v Arkansas* 514 US 927 (1995).
[9] Referring to the early United States exclusionary rule case of *Mapp v Ohio* 367 US 643 (1961).
[10] For a description of the operation of the discretion see *R v Coombes* [1985] 1 NZLR 318.
[11] See *R v Butcher* [1992] 2 NZLR 257 and *R v Te Kira* [1993] 3 NZLR 257.

however, only be admitted where the "overriding interests of justice require it notwithstanding the breach…"[12]

In the 2002 case of *R v Shaheed* [2002] 2 NZLR 377 the New Zealand Court of Appeal altered the *prima facie* rule of exclusion in relation to evidence obtained in breach of the New Zealand Bill of Rights Act, 1990 and provided, instead, for a balancing test whereby a trial court must consider if the exclusion of the impugned evidence is a proportionate remedy in the given case. Applying this test, the court must take into account a number of factors, including the nature of the relevant right; the seriousness of the breach; the availability of alternative police investigative techniques; the nature and quality of the relevant evidence; the importance of the evidence to the prosecution case; and the seriousness of the crime [4, 26 and 27].

In Canada, at common law, the approach to improperly obtained evidence was largely inclusionary. In *R v Wray* (1970) 11 Dominion Law Reports (3d) 673 it was held that a trial judge had no discretion to exclude evidence which was of probative value due to the fact that it had been improperly obtained. However, in 1982 Canada adopted a Charter of Rights and Freedoms which altered the law in this area as section 24(2) declared that evidence obtained in breach of the Charter may be excluded, at the discretion of the trial judge, if its admission is likely to bring the administration of justice into disrepute. In the seminal case of *R v Collins* [1987] 1 Supreme Court Reports 265 the Supreme Court of Canada addressed section 24(2) for the first time and held that in considering whether or not to exercise his discretion to exclude evidence under the Charter a trial judge ought to take into account the fairness of the trial, the seriousness of the violation of rights, and the effect of excluding the evidence. Lamer J. stated that while the administration of justice could be brought into disrepute by the fact that someone who was found guilty at trial of a relatively serious offence would evade conviction due to the exclusion of the impugned evidence, the administration of justice would be brought into greater disrepute if the evidence was not excluded and if the Court failed to dissociate itself from the improper conduct of the police in this case [1987] 1 Supreme Court Reports 265 at para 45.

[12] *R v H* [1994] 2 NZLR 143 at 150 (Richardson J).

Most of these jurisdictions require some sort of judicial analysis and consideration of countervailing factors in the criminal justice system when deciding on the admissibility of improperly obtained evidence in a given case and attempting to draw the line fairly between policing interests and the rights of suspects. Of course, by its nature the exclusionary rule allows only for retrospective judicial oversight of policing in individual cases, although broader messages on acceptable policing and investigative techniques for the future can also emerge from such cases.

In Ireland, no judicial balancing exercise is required or permitted in relation to unconstitutionally obtained evidence, although the law on illegally obtained evidence does provide for this.

The Irish law in relation to improperly obtained evidence was first established in *People (AG) v O'Brien* [1965] Irish Reports 142. In that case, which involved a search warrant innocently but erroneously made out for the wrong address, a two-tiered rule was established:

- In relation to evidence obtained in breach of legal rights only, the trial judge holds a discretion to exclude or admit the evidence, and
- In relation to evidence obtained in breach of constitutionally protected rights, the trial judge has no discretion – he must exclude the evidence on account of the breach, unless there are extraordinary excusing circumstances[13] in existence which would justify its admission; in which case, admission or exclusion is a matter for the discretion of the trial judge.

Since then, although decided on a case-by-case basis, the Irish courts have generally favoured the admission of evidence in the first category, i.e. evidence obtained in breach of mere legal rights. Usually, such evidence will only be excluded where there has been a repeated breach of legal rights, or several cumulative breaches of legal rights.[14] In relation to the exercise of judicial discretion in this area, Hogan has

[13] In *O'Brien*, Walsh J. gave a non-exhaustive list of examples of extraordinary excusing circumstances which might justify the admission or otherwise of unconstitutionally obtained evidence: "the imminent destruction of vital evidence or the need to rescue a victim in peril." *People (AG) v O'Brien* [1965] 1 IR 142 at170.

[14] See *People (DPP) v Lawless* (unreported, Court of Criminal Appeal, November 28, 1985); *People (DPP) v McMahon, McMeel and Wright* [1987] ILRM 87; *DPP v Spratt* [1995] 1 IR 585; [1995] 2 ILRM 117; *People (DPP) v Van Onzen* [1996] 2 ILRM 387; *People (DPP) v Darcy*, (unreported, Court of Criminal Appeal, July 29, 1997); *People (DPP) v Holland*, (unreported, Court of Criminal Appeal,

suggested that the courts, in practice, almost always recognise some reason allowing for the admission of illegally obtained evidence in the overall public interest.[15]

The rule in relation to unconstitutionally obtained evidence, however, has emerged as the more interesting subject area and has given rise to more extensive debate and significant case-law over the years since 1965. As set out below, this rule does not allow for any judicial balancing of varying factors or considerations in a given case and its controlling rationale is the protection of individual rights. Under this regime, deterrence of police misconduct is simply an indirect by-product of the stricter protectionist rationale.

Following the Supreme Court decision in *O'Brien*, the courts began to explore the ambit and application of the exclusionary rule which had been formulated therein. While it had been applied to items of real evidence in *O'Brien*, it was applied to confession evidence for the first time in *People (D.P.P.) v Madden* [1977] Irish Reports 336 where a confession had been obtained from the suspect during a period of unlawful detention, in breach of his constitutional right to liberty. This case was significant, not only because it showed that the rule was applicable to confession evidence, but also because it was held that the impugned evidence had to be excluded even though the gardaí were acting in good faith, i.e. to secure the confession and thereafter the conviction of the suspect. Therefore, no *mala fides* (bad faith) needs to be shown in order for the exclusionary rule to be invoked.

Initially some confusion surrounded the question as to what level of knowledge of a constitutional breach was required on the part of the relevant gardaí, as a condition precedent for the exclusion of evidence. The language of the rule as originally formulated in *O'Brien* seemed to suggest that the gardaí would have to be aware of the fact that they were breaching the suspect's rights in order for the evidence obtained at that time to be excluded. Walsh J in *O'Brien* stated that

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June 15, 1998); *People (DPP) v Connolly* [2003] 2 IR 1; *People (DPP) v Paul Kelly*, (unreported, Special Criminal Court, November 26, 2004); *D.P.P. v Diver* [2005] 3 IR 270.

[15] Note of Dissent on Exclusionary Rule by the Chairman of the Balance in the Criminal Law Review Group, Gerard Hogan [1; p.289].

> The Courts … must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State or its servants or agents as a result of a deliberate and conscious violation of the constitutional rights of the accused person where no extraordinary excusing circumstances exist … [1965] Irish Reports 142 at 170.

The phrase "deliberate and conscious violation" generated some confusion and discussion in later cases and analyses.[16] Did this mean that the relevant gardaí must have known that they were breaching suspect rights at the relevant time in order for the evidence obtained in that manner to be excluded at trial? If so, the rule would operate in a manner similar to that adopted in the United States and would only exclude evidence where there was a deterrent value. Alternatively, perhaps the phrase meant that where deliberate and conscious acts of the gardaí led to the breach of constitutional rights, evidence so obtained would be excluded even if the relevant gardaí did not realise that a breach of constitutional rights was occurring. As the knowledge of the police in this instance would be irrelevant, such a rule would be protectionist rather than deterrent in nature.

Ultimately it was this latter construction of the rule which found favour and was expressly endorsed by the Irish Supreme Court in *People (DPP) v Kenny* [1990] 2 Irish Reports 110; [1990] Irish Law Reports Monthly 569. This case, like *O'Brien*, involved an invalid search warrant. However, unlike *O'Brien*, the invalidity was not apparent on the face of the warrant. At trial, it was held that there was no legal authority in the warrant as it had been issued by a peace commissioner without any evidence that he himself had been satisfied that there were reasonable grounds for the suspicion held by the member of the Garda Síochána who swore information before him.[17] As the legal defect in the warrant was not clear on its face, the gardaí who had purported to execute it at the dwelling of the suspect had not been in any way aware that they were breaching his constitutional right to the inviolability of his dwelling.

Basing its decision largely on the United States case of *US v Leon* 468 US 897 (1983), the Irish Court of Criminal Appeal held that the evidence had been rightly admitted at trial as there was no deliberate and conscious violation of the suspect's constitutional

[16] See *People (DPP) v Walsh* [1980] I.R. 294; *People (DPP) v Shaw* [1982] I.R. 1; *People (DPP) v Healy* [1990] 2 I.R. 73; [1990] I.L.R.M. 313.
[17] As is required under the provisions of the Misuse of Drugs Act 1977.

rights, given the absence of knowledge on the part of the relevant gardaí that they were in breach of such rights. However, this approach was squarely rejected by the Irish Supreme Court which held that evidence obtained from the search carried out pursuant to the defective warrant ought to have been excluded from trial as the search had breached the accused's constitutional right to the inviolability of his dwelling, whether or not the relevant gardaí knew that to be the case. The majority of the Court expressly declined to recognise the deterrence principle as the controlling rationale for the exclusion of unconstitutionally obtained evidence in the Irish context, favouring the ideals of protectionism as the foundation for the operation of the rule. Finlay CJ stated that:

> [A]s between two alternative rules or principles governing the exclusion of evidence obtained as a result of the invasion of the personal rights of a citizen, the Court has … an obligation to choose the principle which is likely to provide a stronger and more effective defence and vindication of the right concerned [1990] 2 Irish Reports 110 at 133; [1990] Irish Law Reports Monthly 569 at 578.

The Court held that a rule based on the protection of rights, rather than one solely based on deterrence, would achieve two important goals: it would prevent gardaí from knowingly or recklessly acting in breach of constitutional rights (a deterrence-based rule would only address intentional breaches of rights), and it would also ensure that those who hold authority over the gardaí would consider in detail the constitutional rights of citizens and the effect which their powers of arrest, detention and search have on such rights. Thus, protectionism was confirmed as the central rationale for the operation of the exclusionary rule in Ireland where constitutional rights have been breached. While deterrence of police misconduct may be an indirect consequence of the operation of the rule, it is not the grounding reason for its application in a given case.

It was acknowledged by the Chief Justice that setting the bar of exclusion at this level would lead to the loss of relevant evidence in criminal prosecutions, but he held that

> [T]he detection of crime and the conviction of guilty persons, no matter how important they may be to the ordering of society, cannot … outweigh the unambiguously expressed constitutional obligation 'as far as practicable to defend and vindicate the personal rights of the citizen' [1990] 2 Irish Reports 110, at 134; [1990] Irish Law Reports Monthly 569 at 579.[18]

[18] Quoting Art.40.3.1 of the Irish Constitution.

Reformulating the rule and omitting the confusing phraseology of *O'Brien*, Finlay CJ stated that:

> … [E]vidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in [the court's] discretion [1990] 2 Irish Reports 110 at 134; [1990] Irish Law Reports Monthly 569 at 579.[19]

It is clear from this formulation of the exclusionary rule that a garda need not knowingly breach constitutional rights in order to give rise to the exclusion of evidence obtained in that manner. If rights have been breached and evidence has been obtained as a result it must be excluded, whether or not the relevant person (usually a garda) who breached the rights was aware that he was doing so at the relevant time.

Strong dissents were issued in the *Kenny* case itself and in later cases too some of the superior court judges expressed their opposition to the strict rule, which can and does lead to the exclusion of otherwise reliable evidence in criminal trials.[20] Furthermore, in 2007, the report of an *ad hoc* group established to consider certain aspects of the criminal process in Ireland, the *Balance in the Criminal Law Review Group* ("the Group"), strongly recommended a change to the exclusionary rule allowing for the exercise of judicial discretion in relation to unconstitutionally obtained evidence in all cases, taking into account the totality of the circumstances, including the rights of the victim [1; p.166].

However, the Chairman of the Group, Dr Gerard Hogan SC, dissented in relation to this recommendation for change and expressed the view that:

> Our society has committed itself to abiding by the rule of law and to respect and vindicate the fundamental freedoms enshrined in the Constitution. It behoves us to take these rights and freedoms seriously and if the occasional

[19] In *Kenny*, the actions of the Gardaí in obtaining the warrant and later forcibly entering the dwelling could not be said to be unintentional or accidental and, although the Gardaí concerned had no knowledge that they were invading the constitutional rights of the appellant, the evidence ought not to have been admitted at trial.

[20] The most significant example of this is the judgment of Charleton J in the High Court in *DPP (Walsh) v Cash* [2007] IEHC 108 (28 March 2007) discussed below. See also the High Court judgment of Edwards J in *DPP (Lavelle) v McCrea* [2009] IEHC 39.

> exclusion of otherwise relevant evidence is the price of respecting these constitutional rights, then that is a price society should be prepared to pay in the interests of upholding the values solemnly enshrined in our highest law … [1; p.287-88].

This statement depicts the current protectionist stance of Irish law in this area and, despite the various calls for change, the reformulation of the *O'Brien* rule in *Kenny* remains the law in place in relation to evidence unconstitutionally obtained by the police in this jurisdiction at present.

"Fruit of the Poisoned Tree"

The main context in which the "fruit of the poisoned tree" doctrine has arisen in Ireland is in relation to the admissibility or otherwise of confession evidence obtained consequent to an unlawful arrest or during a period of unlawful detention. The case of *Madden*, discussed above, was the first case to exclude a confession obtained from a suspect during a period of unlawful detention. Similarly, in *People (DPP) v Laide and Ryan* [2005] 1 Irish Reports 209 it was held that statements made by the second-named appellant ought not have been admitted at trial as they had been made while in unlawful detention, subsequent to an unlawful arrest. In that case, gardaí had entered the home of the second-named appellant on foot of a search warrant which was later found to be invalid and had arrested him within his home. McCracken J in the Court of Criminal Appeal, applying the exclusionary rule as set out in *Kenny*, held that although the gardaí considered themselves to be lawfully within the appellant's home at the relevant time, their intentional and deliberate actions in entering the home were in fact in breach of the appellant's constitutional right to the inviolability of the dwelling (due to the invalid search warrant) and therefore the arrest was unlawful [2005] 1 Irish Reports 209 at 234–35. In the absence of extraordinary excusing circumstances, statements made by the appellant to gardaí while in unlawful detention consequent on the unlawful arrest ought to have been excluded from evidence at trial.

In order for confession evidence to be excluded as "fruit of the poisoned tree", i.e. where the confession is connected to an earlier, related breach of constitutional rights, there must be an ongoing causative link in place. If the violation of rights has in some way been remedied prior to the making of inculpatory statements, then there is no requirement that such statements should be excluded at trial. This is clear from the

cases of *People (DPP) v Buck* [2002] 2 Irish Reports 260; [2002] 2 Irish Law Reports Monthly 454 and *People (DPP) v O'Brien* Unreported, Court of Criminal Appeal, June 17, 2002; [2005] 2 Irish Reports 206, which centred on the right to pre-trial legal advice.

In *Buck*, the suspect was arrested on a Sunday morning and, due to the holding of a major sporting event in the locality, the gardaí were unable to contact a solicitor, as requested by the detained suspect. It was found as a fact that the gardaí had at all times acted *bona fide* (in good faith) in their efforts to secure a solicitor for the suspect. Despite not securing a solicitor, the gardaí went ahead and questioned the suspect.[21] He, however, made no statements until later in the day following the eventual arrival of a solicitor and advice received from him.

The argument raised at trial and on appeal was that the statements made by the accused ought to have been excluded as there had been a breach of his constitutionally protected right of access to pre-trial legal advice.[22] It was held, however, that the statements made by the suspect were admissible in evidence as there had been no conscious and deliberate breach of his constitutional rights. It was also suggested that even if there had been a breach, a causative link between such breach and the making of any statement by the suspect would have to be shown before the statement would be excluded from evidence at trial.

Following *Buck*, the case of *O'Brien* arose wherein the gardaí were found to have acted *mala fides* in their efforts to secure a solicitor for the suspect to the extent that they had consciously and deliberately breached his constitutional right of access to legal advice in the pre-trial process. In this case, the suspect made statements to the gardaí both before and after eventual consultation with his solicitor. It was held by

[21] Unlike the position in England and Wales whereby a detained suspect who requests legal advice cannot be interviewed until he has received such advice [29; para 6.6], there is no prohibition on the questioning of a suspect in Ireland prior to the arrival of a requested solicitor. The Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 [7: regulation 11]does state, however, that where a detained suspect has requested a consultation with a solicitor he is not to be asked to make a written statement until a reasonable time for the attendance of the solicitor has elapsed. Also, if certain inference-drawing provisions are to be invoked, legislation provides that the accused should be afforded a reasonable opportunity to consult with his solicitor, e.g. s.19A of the Criminal Justice Act, 1984, as inserted by the Criminal Justice Act, 2007. See further *DPP v Raymond Gormley* [2010] IECCA 22.

[22] See *People (DPP) v Healy* [1990] 2 Irish Reports 73; [1990] Irish Law Reports Monthly 313.

both the Court of Criminal Appeal and the Supreme Court that the first set of statements made by the suspect while the breach of his right to pre-trial legal advice was ongoing had to be excluded from evidence at trial due to that breach, but that the second set of statements could be admitted in evidence as the breach was no longer ongoing at the time when those statements were made and there was no causative link between the breach and the making of the statements [11].

While there seemed to be little real consideration by the Court of Criminal Appeal or the Supreme Court in *O'Brien* as to whether or not there might be any ongoing effect of the earlier breach of the right to legal advice, these cases clearly illustrate the operation of the "fruit of the poisoned tree" doctrine in an Irish context. The central issue is the existence of a causative link between the breach of constitutional rights and the obtaining of the relevant evidence. And again, while the intention of the court may be to protect the rights of the accused, the implications for police conducting investigations and interviews are significant if one action can have a rolling effect.

Although most of the Irish cases in relation to the derivative exclusion of evidence relate to confessions, the courts have also excluded items of real evidence due to earlier, related breaches of constitutional rights. In *DPP v O'Neill* [2008] IEHC 457 (15 February, 2008), for example, Edwards J. in the High Court held that a blood sample taken from the suspect following an unlawful arrest and related unlawful detention ought to have been excluded from evidence at his trial on drink-driving charges.

The jurisprudence in this area has centred on evidence obtained post-arrest which is later sought to be produced against the accused at trial. The *Cash* case, however, presented a somewhat different set of circumstances as it concerned evidence obtained prior to arrest which was not itself produced at trial.

D.P.P.(Walsh) v Cash [2007] IEHC 108; [2010] IESC 1.
The accused in this case, John Cash, had been arrested on suspicion of burglary on a certain date several years prior to the instant proceedings. During a period of detention subsequent to that arrest his fingerprints were taken. It was unclear whether statutory powers to take fingerprints were exercised [6; section 6] or whether the

suspect consented to the taking of fingerprints, which would not require the statutory mechanism to be invoked.[23] The case against Mr. Cash at that time was not pursued and, accordingly, his fingerprints ought to have been destroyed had they been obtained under the statutory regime.[24] No such destruction requirement exists where fingerprints are taken by consent.[25] Mr. Cash's fingerprints were not destroyed; they were retained in the Garda Technical Bureau.

The instant proceedings began with a burglary at a premises and the taking of fingerprints at the crime scene. These prints were run through the fingerprint database at the Garda Technical Bureau and matched with the prints taken earlier from Mr. Cash. Mr. Cash was arrested and detained on suspicion of burglary. During this period of detention a second set of prints was obtained from him, by consent.[26] He was then charged with the offence and subsequently convicted.

Questions arose as to the status of the first set of fingerprints, which gave rise to the second arrest and ultimately to the taking of a second set of prints. The accused's defence team argued that the prosecution had failed to establish beyond reasonable doubt that the first set of prints had been legally retained and further argued on that basis that the evidence flowing from such prints ought to have been excluded at trial.

[23] According to the Law Reform Commission, [18; para. 4.09, 4.14] consent is the method most commonly used by the Gardaí for taking forensic samples, partly because they perceive the requirements of the statutory regime to be too burdensome. Leahy [19; p.67] has suggested, in relation to bodily samples, that "…it is necessary that at least three gardaí take a total of 20 separate steps" in order to lawfully obtain such samples under the relevant legislation. In *People (DPP) v Boyce* [2005] IECCA 143; [2008] IESC 62, both the Court of Criminal Appeal and the Supreme Court held that the statutory scheme for the taking of bodily samples co-exists with the voluntary scheme based on consent. This position may be altered in the future as draft legislation currently before the Houses of the Oireachtas proposes to insist on the operation of the statutory regime where a bodily sample is to be taken from a person detained in garda custody: Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010 s.26.

[24] Criminal Justice Act, 1984, s.8, as amended by the Criminal Justice Act, 2006, provides that fingerprints taken from suspects who have been arrested and detained under either the Criminal Justice Act, 1984 or the Criminal Justice (Drug Trafficking) Act, 1996 and any copies thereof must be destroyed at the expiration of 12 months from the taking of such prints if proceedings are not instituted against the relevant suspect and the failure to institute the proceedings within that period is not due to the fact that he has absconded or cannot be found.

[25] The Law Reform Commission [18; para 4.09] has noted that in practice where assurances are given by the gardaí that fingerprints will not be retained or where a volunteer requests that his prints be destroyed, then they are destroyed.

[26] Written consent was given by the suspect's mother as the suspect was at the time under 18 years of age.

Both the High Court and the Supreme Court viewed the law on arrest as central to the appeal in *Cash* and held that the exclusionary rule from *Kenny* is only applicable to evidence sought to be presented in a criminal trial, and has no role in relation to evidence used to ground a reasonable suspicion for an arrest. In the High Court Charleton J, dismissing the appeal, held that

> evidence resulting from a detention based upon a suspicion that cannot be proved as being founded entirely upon evidence lawfully obtained is not, for that reason, made unlawful [2007] IEHC 108 at para 68.

As he recognised no unlawfulness, the learned judge rejected the contention that the exclusionary rule was applicable on the facts of this case. However, he took the opportunity presented by the case to express his negative view of that rule in quite forceful terms:

> [a] rule which remorselessly excludes evidence obtained through an illegality occurring by a mistake does not commend itself to the proper ordering of society which is the purpose of the criminal law [2007] IEHC 108 at para 65.

Charleton J considered that the decision whether or not to exclude evidence at trial should be based on a balancing of the interests of society as against the interests of the accused, taking into account the rights of the victim.

Given the strong opinion expressed by Charleton J in the High Court, it was thought that the Supreme Court might also avail of the opportunity to address the operation of the exclusionary rule and, perhaps, to reinterpret it in a less stringent manner. This did not occur. Instead, the Supreme Court, like Charleton J, held that the exclusionary rule was not applicable and dismissed the appeal. While it did not substantively address the content or operation of the rule, the decision of the seven-judge Supreme Court in *Cash* is of much significance to the law in this area and, indeed, to police investigations in the future. The Court may have thought itself to be neatly side-stepping the sticky issue of exclusion, but, it may in fact have caused more harm than good in so doing. Giving the decision of the Court, Fennelly J[27] stated that the main issue for consideration in *Cash* was whether

[27] Murray CJ, Denham, Geoghegan, Macken, and Finnegan JJ concurring. Hardiman J delivered a separate judgment in which he lamented the lack of evidence in relation to any unconstitutionality in the retention of the first set of fingerprints and accordingly held that the matter would have to be remitted to the District Court and none of the questions which appeared to be raised could be answered.

> the absolute exclusionary rule laid down in *Kenny* should be extended to cover facts, not being offered as part of the evidence at a criminal trial, but giving rise to the suspicion which led to the arrest. [2010] IESC 1 at para 24.

He went on to hold that this rule is only relevant to the exclusion of evidence proffered at a criminal trial and is not concerned with "the lawful provenance of evidence used to ground a suspicion" [2010] IESC 1 at para 30. He suggested that the appellant was seeking to extend the exclusionary rule beyond its correct boundaries and that doing so would "blur the distinction between the arrest and the trial" [2010] IESC 1 at para 33.

The Court viewed the central issue then as the lawfulness of the accused's arrest, rather than any "fruit of the poisoned tree" argument centred on a causative link between the potentially unconstitutional retention of the first set of fingerprints and the taking of the second set of fingerprints.

Quoting from the High Court decision, Fennelly J, in the Supreme Court, observed that, in relation to the requirements of a lawful arrest, it has never been held that

> what would found a reasonable suspicion in law, requires to be based on the kind of evidence that would be admissible under the rules of evidence during the hearing of a criminal trial. [2010] IESC 1 at para.32, quoting [2007] IEHC 108 at para. 12 (Charleton J).

The learned judge stated that "[t]he lawfulness of an arrest and the admissibility of evidence at trial are different matters which will normally be considered in distinct contexts." [2010] IESC 1 at para 41.

While the Supreme Court's avoidance of an in-depth analysis of the strict exclusionary rule from *Kenny* means that the protectionist stance adopted therein continues to prevail in relation to unconstitutionally obtained evidence proffered at trial, it is submitted that the Court's judgment has serious implications for the investigation of offences and the rights of the accused within the Irish criminal process. Its view that the exclusionary rule is not relevant to pre-arrest matters seems distinctly at variance with the general tenor of previous Irish case-law and provides a

very weak basis for the protection of suspects' rights, not to mention the judicial oversight of policing.

The decision focused on the view that evidence which grounds reasonable suspicion for a lawful arrest would not always be acceptable under the evidentiary rules of the courts and need not be proven by the prosecution as so being. While this may be true in certain situations, it is arguable that there is a distinction between unlawfully or unconstitutionally obtained evidence and evidence lawfully obtained which would not be acceptable in the courts for other reasons. One example of material which might ground a lawful arrest but would not be admissible as evidence at trial, which was in fact adverted to by Charleton J in the High Court, is hearsay evidence. The rationale for the exclusion of hearsay evidence at trial centres on the reliability of such evidence and the dangers inherent in not being able to adequately test that evidence in the courtroom.[28] However, the rationale for the exclusion of unconstitutionally obtained evidence from trials in Ireland is based on the protection of constitutional rights, and this was expressly noted by Fennelly J in the Supreme Court in *Cash* [2010] IESC 1 at paras 20/21.

One would have thought that, in order to give effect to the protectionist stance adopted in *Kenny*, evidence obtained (or retained) in violation of constitutional rights ought not to be allowed as the basis for a lawful arrest, or, if relied upon to ground an arrest should render that arrest unconstitutional, and any evidence subsequently obtained ought to be excluded accordingly. If the first set of fingerprints in *Cash* ought to have been destroyed then their retention would breach the appellant's right to privacy (both under the Constitution[29] and under the European Convention on Human Rights[30]) and their use to ground an arrest could be seen as a breach of the right to liberty.[31] The second set of fingerprints thereafter obtained and presented at trial ought then to have been excluded due to the earlier, causatively linked breach of

[28] See, for example, *Teper v R* [1952] AC 480, 486 *per* Lord Normand: "It [hearsay]is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost."
[29] The right to privacy has been recognised as a constitutionally protected right in a number of cases including: *McGee v AG* [1974] IR 284; *Norris v AG* [1984] IR 36; *Kennedy v Ireland* [1987] IR 587.
[30] See *S. and Marper v United Kingdom* (4 December, 2008).
[31] Expressly protected under Art. 40.4.1 of the Constitution.

rights. Such a decision would have been in line with the Irish "fruit of the poisoned tree" jurisprudence, but was not the decision made in *Cash*.

A worrying question which presents itself at this juncture relates to the ability of the courts, post-*Cash* to reach the pre-arrest period of investigation, to consider police procedures at that time, to ensure the protection of constitutional rights at that time and to vindicate such rights in the event of violation. On the basis of *Cash*, is it correct to assume that if the gardaí were to *purposefully* breach an individual's constitutional rights in order to gain evidence to ground an arrest (e.g. by knowingly entering a dwelling place without lawful authority to carry out a search prior to arrest, or by assaulting an individual in order to get information from them about their commission of an offence prior to an arrest) that the courts would not deem the arrest unlawful/unconstitutional and would not exclude any evidence subsequently obtained? This would be vastly at variance with the past jurisprudence of the Irish courts. One would have to hope that a trial court could address such pre-arrest improprieties and deem evidence derived from intentional breach of constitutional rights to be inadmissible. If it did exclude in that instance, but not in situations such as *Cash*, the rationale of the Irish exclusionary rule would surely be altered as deterrence would seem to take precedence over protectionism, with exclusion being based on garda intention rather than on the protection of rights. In any event, on the basis of *Cash* one could argue that even in such a hypothetical scenario the courts would not be concerned with the manner in which the evidence used to ground the arrest was obtained.

Conclusion

It will take some time for the decision in *Cash* to fully permeate Irish jurisprudence in relation to the exclusion of evidence and for further applications of the view expressed therein to occur. Perhaps the true remit of the decision will only be clear at that point.

At this point in time, the judgment can be viewed as most worrying in terms of the protection of rights in the criminal process and the judicial oversight of policing. It is submitted that it might have been better for the protection and vindication of rights if the Supreme Court had addressed the ongoing application of the strict exclusionary

rule in this case and decided, for example, to apply the rule but to find that there were extraordinary excusing circumstances in existence in this case justifying admission. Even if the Supreme Court had considered that the strict rule ought to be altered and should now only be applied in circumstances of intentional, knowing breach by the gardaí, thus perhaps not applying in this case and adopting a new deterrent rationale, it might have been better. To hold, as the Court did instead, that the exclusionary rule has no application in relation to pre-arrest impropriety is most dangerous. Clearly, if a case does not come to trial, the courts have no ability to control or question investigative techniques and any improprieties would fall to be dealt with through garda discipline or by way of civil actions. However, when a case does come before the courts, they ought not to turn a blind eye to the investigative stage and consider only whatever evidence is proffered at trial. In fact, even considering only the evidence presented at trial, *Cash* ought arguably to have been otherwise decided given that the evidence presented at trial could still be traced back to potentially unconstitutionally retained evidence, i.e. the original fingerprints whose "lawful provenance" could not be established by the prosecution.

A very similar case to *Cash* arose in England and Wales in 2001 and, despite a significantly different approach to the admission or exclusion of tainted evidence in that jurisdiction, the House of Lords did not suggest that the rules on exclusion were inapplicable. The *Attorney General's Reference (No. 3 of 1999)* [2001] 2 AC 91; [2001] 1 All ER 577, involved the retention of a DNA sample contrary to section 64 of the Police and Criminal Evidence Act, 1984. As in *Cash*, the wrongly retained sample was matched with a scene of crime sample and gave rise to the arrest of the accused and the taking of a subsequent sample of hair for the purpose of extracting a DNA profile.

Construing section 64 of the 1984 Act in conjunction with section 78 of that Act, and considering arguments relating to breaches of the accused's right to privacy, Lord Steyn stated that

> It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal

> case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public. [2001] 2 AC 91, 118; [2001] 1 All ER 577, 584.

Balancing the "triangulation of interests" in this case, the House of Lords favoured the admission of the evidence. While the case is not identical to *Cash*, in that it involved a bodily sample rather than a fingerprint[32] and there was an admitted breach of the legislative requirement to destroy the sample here, it has to be considered highly unusual that the Irish courts have adopted a stance in *Cash* which provides less protection for rights in the criminal process and less oversight of police investigative techniques than that adopted in England and Wales. At least the decision of the House of Lords allows the possibility that in a given future case the triangulation of interests might rest in favour of the exclusion of specific evidence. The Irish decision places any consideration of such matters out of the hands of the courts.

Other jurisdictions too have applied balancing tests in similar cases. In New Zealand, for example, the case of *R v Shaheed*, noted at the beginning of this article, led to the removal of the *prima facie* rule of exclusion in relation to evidence obtained in breach of the New Zealand Bill of Rights Act, 1990, and its replacement with a balancing test to be exercised at the discretion of the trial judge. While this case did see something of a reduction in the strictness of the exclusionary rule in that jurisdiction, the New Zealand Court of Appeal did not set police investigative matters beyond the reach of the courts and the application of the newly-constructed rule. In fact, applying the new rule, a majority of the Court held that the derivative DNA evidence in that case ought to have been excluded at trial.

While this author supports the continuing application of a strict exclusionary rule in relation to unconstitutionally obtained evidence in Ireland which both vindicates constitutional rights and directs police practices, this ought not to give rise to obscure jurisprudence which is potentially based on a desire to circumvent discussion or reinterpretation of that rule. The application of a less strict, discretion-oriented

[32] It is notable that the European Court of Human Rights in *S. and Marper v United Kingdom* (4 December, 2008) drew no functional distinction between fingerprints and bodily samples in relation to the application of the Art.8 ECHR right to privacy, despite acknowledging that the retention of material which can give rise to a DNA profile involves a deeper intrusion into private life. See further, Heffernan [15].

balancing test would, in the absence of any stronger protection for rights within the criminal process, be better than nothing at all. It would also mean that, unlike the effects of the *Cash* decision, the courts could look at, discuss and consider the constitutionality, legality and fairness of pre-arrest policing techniques, which must surely be viewed as an appropriate and necessary aspect of the judicial oversight of policing. This is not to suggest that evidence grounding an arrest ought to meet the evidential and procedural requirements of evidence proffered at trial, but merely to allow the courts to hold gardaí, as agents of the state, accountable for breaches of rights (primarily constitutional rights, but legal rights also) at whatever stage of the criminal process they occur.

Reference List

1. Balance in the Criminal Law Review Group. (2007). *Final Report.* Dublin.

2. Choo, A. L-T., & Nash, S. (2003). Evidence Law in England and Wales: The Impact of the Human Rights Act 1998. *International Journal of Evidence &Proof,* 7(1), 31-62.

3. Choo, A. L-T., & Nash, S. (1999). What's the Matter with Section 78? *Criminal Law Review,* December, 929 -940.

4. Consedine, S. (2004). R v Shaheed: the First Twenty Months. *Canterbury Law Review*, 10(1), 77-105.

5. Conway, V., Daly, Y.M. &Schweppe, J. (2010). *Irish Criminal Justice: Theory Practice and Procedure*. Dublin: Clarus Press.

6. Criminal Justice Act, 1984.

7. Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987.

8. Criminal Justice Act, 2007.

9. Criminal Justice (Drug Trafficking) Act, 1996.

10. Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010.

11. Daly, Y.M. (2006). Does the Buck Stop Here?: An Examination of the Pre-Trial Right to Legal Advice in light of O'Brien v D.P.P. *Dublin University Law Journal,* 28, 345-362.

12. Daly, Y.M. (2009). Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change. *Irish Criminal Law Journal*, 19(2), 40-50.

13. Dripps, D. (2001). The Case for the Contingent Exclusionary Rule. *American Criminal Law Review*, 38(1), 1-46.

14. Fennell, C. (2009). *The Law of Evidence in Ireland.* 3rd Edition. Dublin: Bloomsbury Professional.

15. Heffernan, L. (2009). DNA and Fingerprint Data Retention: S. and Marper v United Kingdom. *European Law Review,* 34(3), 491-504.

16. Kamisar, Y. (2003). In Defense of the Search and Seizure Exclusionary Rule. *Harvard Journal of Law and Public Policy*, 26(1), 119-143.

17. Keane, A. (2008). *The Modern Law of Evidence*. 7th Edition. Oxford: Oxford University Press.

18. Law Reform Commission. (2004). *Consultation Paper on the Establishment of a DNA Database*. Dublin: LRC CP29-2004.

19. Leahy, E. (1995). Genetic Profiling and the Reasonable Doubt. *Medico-Legal Journal of Ireland*, 1(2), 66-68.

20. Martin, F. (1992). The Rationale of the Exclusionary Rule of Evidence Revisited. *Irish Criminal Law Journal*, 2(1), 1-18.

21. McGrath, D. (2004). The Exclusionary Rule in Respect of Unconstitutionally Obtained Evidence. *Dublin University Law Journal*. 26(1),108-128.

22. McGrath, D. (2005). *Evidence*. Dublin: Thomson Round Hall.

23. Misuse of Drugs Act 1977.

24. New Zealand Bill of Rights Act, 1990.

25. O'Malley, T. (2009). *The Criminal Process.* Dublin: Round Hall.

26. Optican, S. (2004). The New Exclusionary Rule: Interpretation and Application of R v Shaheed. *New Zealand Law Review*, 3, 451-535.

27. Optican, S., & Sankoff, P. (2003). The New Exclusionary Rule: A Preliminary Assessment of R v Shaheed. *New Zealand Law Review*, 1, 1-44.

28. Police and Criminal Evidence Act 1984.

29. Police and Criminal Evidence Act, 1984 Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Code of Practice C).

30. Sklansky, D.A. (2007-2008). Is the Exclusionary Rule Obsolete? *Ohio State Journal of Criminal Law*, 5(2), 567-584.

31. Walsh, D. (2002). *Criminal Procedure.* Dublin: Thomson Round Hall.